

NTSB Order No. EA-3800

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 10th day of February, 1993

Respondent .

Docket SE-9810

<sup>1</sup>A copy of the oral initial decision, an excerpt from the transcript, is attached.

section 91.9 of the Federal Aviation Regulations, 14 C.F.R. Part 91.<sup>2</sup> The Administrator's order, which was filed as the complaint in this matter, alleges the following facts in support of the allegation:

2. On or about January 11, 1988, you acted as pilot-in-command of a Northeastern Aviation Gates Learjet LR-24F aircraft, identification N13KL, on a flight to Republic Airport, Farmingdale, N.Y.

3. At the conclusion of the above-described flight, you executed a night-time VFR landing to Republic Airport when the airport was NOTAM-closed due to inoperative runway lights.

4. During the above-described landing, you made a series of abrupt low-altitude maneuvers to line up with the centerline of runway 19.

Carmine Gallo is an FAA air traffic control (ATC) specialist who also holds an ATP certificate and who is a certified flight instructor. He was handling the local and ground control positions and was the supervisor at the Republic tower, at the time of the incident. He testified that on the day in question, a power outage occurred at 2220 Zulu hours [6:20 p.m.], which affected the runway lights, taxiway lights, obstruction lights, and visual approach locator lights at the airport. At 6:23 p.m., Controller Gallo suspended air traffic services and advised approach control that the airport was closed. At 6:43 p.m., a Notice to Airmen (NOTAM) was issued by approach control, closing

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<sup>2</sup>FAR §91.9 provided at the time of the incident as follows:

"§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

the airport. According to Controller Gallo, at 6:45 p.m., he recorded the NOTAM on the ATIS [Automated Terminal Information Service].

At 6:49:42 p.m., respondent contacted Republic tower and advised Controller Gallo that he was twenty-five miles east of Republic Airport, and that his aircraft was still in communication with approach control.<sup>3</sup> Controller Gallo advised respondent that the airport was closed because there was no lighting.<sup>4</sup> Respondent acknowledged the information, and advised the tower that "we have minimum fuel and that's going to create a real problem for us ah we're familiar with airport and do not require the runway lights." Controller Gallo told respondent that everything was out of service -- "runway lights, taxiway lights, airport rotating beacon" -- and respondent reiterated that he understood, but that lights would not be required for his landing. Controller Gallo asked respondent if he was declaring an emergency. Respondent replied that he was not, stating that he only had a minimum fuel situation.

At 6:51:10 p.m., respondent reported to the tower that he was now 20 miles east of Republic Airport. According to

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<sup>3</sup>Respondent's co-pilot was handling communications with approach control.

<sup>4</sup>Controller Gallo testified that he advised the Approach Controller to tell respondent's aircraft that Republic was closed, and he believes that when respondent first contacted Republic Tower at 6:49:42, respondent had already been so advised and that is why respondent told Republic Tower that he was "still with approach," but that he was trying to get more information about Republic. (TR-99).

Controller Gallo, this placed respondent's aircraft in close proximity to Islip Airport. Controller Gallo advised respondent that if he was minimum fuel, "Islip is available," for landing,<sup>5</sup> but that if he landed at Republic, he did so "at his own discretion." Respondent replied that he was not sure what the controller meant by "our own discretion," to which the controller responded that he could not provide air traffic control services or separation on the runway, without lights. Respondent acknowledged that he would "accept responsibility for the landing at Republic." See Administrator's Exhibit 4, Transcript of Communications between Learjet N13KL and Republic ATC Tower.

Respondent bypassed Islip. He landed at Republic Airport at approximately 7:00 p.m. Controller Gallo testified that he observed the landing, and in his opinion, respondent did not execute a normal, straight-in approach. He described respondent's aircraft as operating at a low altitude, and then making an abrupt right turn followed by an abrupt left turn, in order to align the aircraft with the runway.<sup>6</sup>

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<sup>5</sup>According to Controller Gallo, he had already advised approach control that respondent was in a minimum fuel situation, and that was how he knew he could inform respondent that Islip was available. In his opinion, it would have been more prudent for respondent to land at Islip. He explained that respondent would have been given priority at Islip, and that he would have therefore experienced little delay in landing. He also noted that respondent was only 10 miles from Islip, but 25 miles from Republic, at the time he stated that he had a minimum fuel situation.

<sup>6</sup>Controller Gallo testified that it appeared to him that respondent made these turns so he could find the runway surface, and so that he could avoid the old airport tower.

Respondent has been a pilot for more than 35 years, and he has over 15 years of experience flying Learjets.<sup>7</sup> He has flown this particular aircraft, which is based at Republic Airport, several times a week, for four or five years. He testified that the subject flight was coming in from overseas, and he was low on fuel because he had encountered strong headwinds which had not been forecasted. According to respondent, there was confusion in the cockpit because approach control did not advise that Republic Airport was closed until the aircraft was in the Republic Airport traffic area,<sup>8</sup> and respondent considered the tower's information "unofficial" because it did not have jurisdiction over his aircraft. According to respondent, by the time approach control did confirm the NOTAM, the fuel situation had deteriorated markedly,<sup>9</sup> and he was concerned that if he landed at Islip he would not have sufficient fuel to execute a go-around, if one was necessary in the event that airline traffic delayed his landing there. Respondent testified that he believed that under the circumstances, it was more prudent for him to proceed to Republic. In his opinion, as pilot-in-command he had the right to exercise his discretion and decide what action to take to

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<sup>7</sup>The subject aircraft is a Learjet and Controller Gallo is not Learjet rated.

<sup>8</sup>Respondent's co-pilot also testified that approach control said nothing about the NOTAM until the aircraft was fairly close to the airport traffic area.

<sup>9</sup>Respondent admits that after he told air traffic control that he did not have an emergency, he did get a low fuel warning light.

resolve an emergency which he believes was not of his own making.

Respondent describes his landing at Republic as uneventful.

The law judge rejected respondent's position. He concluded that respondent was near Islip when he was advised that Republic Airport was closed, noting that respondent landed 11 minutes after he was advised of the NOTAM by the tower. The law judge further noted that respondent never declared an emergency, never told ATC that he had a low fuel light, and never told ATC he could not land at Islip because he had insufficient fuel to execute a go-around. Implicitly, the law judge also rejected respondent's claim concerning the nature of his landing, finding that respondent did make abrupt, low maneuvers on approach. Finally, implicit in the law judge's factual findings is a credibility finding against respondent and in favor of the testimony of the Administrator's witnesses. The law judge concluded that the Administrator had established the violation of FAR section 91.9, and that respondent was not entitled to waiver of sanction under the terms of the Aviation Safety Reporting System (ASRP) because his actions were not inadvertent. He affirmed the order in its entirety.

Respondent asserts on appeal that the law judge's findings are not supported by a preponderance of the evidence. He claims that he was faced with an emergency situation, and pursuant to FAR section 91.3, he had the authority to deviate from the NOTAM.<sup>10</sup> Respondent also asserts that the fact that he was not

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<sup>10</sup>FAR § 91.3 provided at the time of the incident as

separately charged with an operational violation for landing at a NOTAM-closed airport, precludes a finding of a violation of FAR section 91.9.<sup>11</sup> Finally, respondent attacks the law judge's credibility findings in favor of the air traffic controller, who respondent claims expressed a "layman's" opinion on the landing.

Regarding sanction, respondent claims immunity under the provisions of the ASRP. The Administrator has filed a brief in reply, urging the Board to affirm the initial decision.

Upon consideration of the briefs of the parties, and of the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order. For the reasons that follow, we will deny respondent's appeal.

We find respondent's arguments unavailing. He offers us no persuasive reason to disturb the law judge's findings, which are supported by the testimony of Controller Gallo and corroborated

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follows:

"§ 91.3 Responsibility and authority of the pilot in command.

(a) The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft.

(b) In an emergency requiring immediate action, the pilot in command may deviate from any rule of this subpart or of Subpart B to the extent required to meet that emergency.

(c) Each pilot in command who deviates from a rule under paragraph (b) of this section shall, upon the request of the Administrator, send a written report of that deviation to the Administrator."

<sup>11</sup>The Administrator's motion at the hearing to amend the complaint to include an allegation of a violation of FAR §91.91(b), was denied by the law judge.

by the transcript of communications between him and respondent.<sup>12</sup>

Respondent was told that there was a power outage at Republic Airport, and we fail to see what difference it made whether approach control or the tower gave him that information. He was not presented with conflicting information concerning an instruction or a clearance, which might have required him to make a choice on how to proceed. There simply was no reason to question the information from the tower air traffic controller, who was in the best position to know the current status of the runways. Moreover, respondent acknowledged receipt of that information, i.e., he knew that the airport was closed because it had no lighting. Absent an emergency, he had no authority to ignore this information, and landing under such circumstances constitutes a careless operation. See Administrator v. Searight, 5 NTSB 27 (1985)(evidence of takeoff and landing at closed airport establishes FAR section 91.9 violation). Nor is the finding of an underlying violation of FAR section 91.91(b) necessary in order to sustain a finding of a violation of FAR section 91.9. Administrator v. Latham, NTSB Order No. EA-3506 (1992)(Where airport manager had no authority to issue NOTAM closing runway, requiring dismissal of section 91.91(b) allegation, violation of section 91.9 affirmed). Even though

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<sup>12</sup>With regard to Controller Gallo's observations on the landing, respondent attacks the credibility of his testimony because Gallo is not Learjet-rated. We fail to see the significance of this factor. Controller Gallo is a highly experienced controller and an ATP pilot. He is more than qualified to know the difference between a normal, straight-in approach and one involving low altitudes and abrupt maneuvers.



respondent may have been able to land without runway lights, the choice<sup>13</sup> to land at Republic Airport under such circumstances was still imprudent because he had no ATC services and the hazards of the landing were substantially greater.<sup>14</sup> Respondent's actions jeopardized the safety of his aircraft and its occupants as well as persons and property on the ground.

As to whether there was an emergency which could excuse respondent's actions, we find his claims meritless. The record overwhelmingly supports the fact that respondent knew the difference between declaring an emergency and stating that he had a minimum fuel situation. He chose the latter. Even when pressed by ATC, he refused to declare an emergency, and as the law judge pointed out in his decision, when the warning light actually indicated that an emergency situation might soon exist, respondent, who was still in communication with ATC, failed even then to declare an emergency.<sup>15</sup> In the Board's view, if an

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<sup>13</sup>In the Board's view, the fact that respondent chose to bypass Islip and land at Republic makes his careless act deliberate and not inadvertent, taking it outside the parameters of the ASRP. Ferguson v. NTSB, 678 F.2d 821, 828 (9th Cir. 1982).

<sup>14</sup>Although respondent claims that he was able to see the centerline because of the clearness of the night and the reflection caused by snow near the runway, we question how he could have predicted these conditions before his landing. In any event, he had no ability to predict what other conditions existed, nor did he even know what had caused the power outage. What if there had been an accident at the airport which had caused the power outage and there were emergency crews on the runway? The possibilities for endangerment are endless, and, in our view, not remote.

<sup>15</sup>Respondent attempts to draw an analogy between his situation and that which occurred in an accident investigated by

emergency existed, it did not occur until after respondent chose to bypass Islip Airport. He knew that Republic Airport was closed when he had ample time and opportunity to execute a safe landing at Islip Airport. His decisions to bypass Islip and land at Republic Airport, when Republic was closed, evidence clearly deficient judgment, and supports the finding of a violation of FAR section 91.9.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The Administrator's order and the initial decision are affirmed; and
3. The 60-day suspension of respondent's Airline Transport Pilot certificate shall commence 30 days after service of this order.<sup>16</sup>

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

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the Safety Board involving Avianca Airlines, NTSB Report AAR-91/04, where the pilot of that aircraft failed to declare an emergency and crashed because of fuel exhaustion. Contrary to respondent's assertions, in that investigation the Board found that the controllers' actions were proper and responsive to a request which was not characterized as an emergency, because the flightcrew did not adequately communicate its critical fuel situation to ATC. The only analogy to be drawn between these situations is that in both the pilot failed to use the accepted terminology to characterize his fuel situation.

<sup>16</sup>For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR §61.19(f).